

Wag Silver

HOLLAND & HART LLP
ATTORNEYS AT LAW

DENVER • ASPEN
BOULDER • COLORADO SPRINGS
DENVER TECH CENTER
BILLINGS • BOISE
CHEYENNE • JACKSON HOLE
SALT LAKE CITY

SUITE 3200
555 SEVENTEENTH STREET
DENVER, COLORADO 80202-3979
MAILING ADDRESS
P.O. BOX 8749
DENVER, COLORADO 80201-8749

TELEPHONE (303) 295-8000
FACSIMILE (303) 295-8261
www.hollandhart.com

LAWRENCE E. VOLMERT
(303) 295-8528
(303) 975-5396 Fax
lvolmert@hollandhart.com

February 16, 2000

Mr. Chuck Clarke
Regional Administrator
U.S.E.P.A., Region 10
1200 Sixth Ave.
Seattle, WA 98101

Mr. Chuck Findley
Deputy Regional Administrator
U.S.E.P.A., Region 10
1200 Sixth Ave.
Seattle, WA 98101

Mr. Doug Hardesty
Federal and Delegated Programs Officer
U.S.E.P.A., Region 10
1200 Sixth Ave.
Seattle, WA 98101

**Re: Request for Stay of (1) Administrative Order Dated
February 8, 2000, *In the Matter of Cominco Alaska, Inc.*
(Docket No. CAA-10-2000-0035), and (2) Finding of
Noncompliance and Order, Dated December 10, 1999, *In
the Matter of: State of Alaska Department of Environmental
Conservation* (Docket No. CAA-10-99-0263)**

Dear Mr. Clarke, Mr. Findley, and Mr. Hardesty:

We represent Cominco Alaska Incorporated ("Cominco") with respect to the above-referenced Administrative Order and Finding of Noncompliance and Order (the "Orders") issued by EPA. Your Orders address a centrally important feature of the Production Rate Increase ("PRI") at Cominco's Red Dog Mine, namely its source of power. Unlike surface mines in other states, the Red Dog must obtain PSD permits because it must generate its own power. Your Order prohibits the Alaska Department of Environmental Conservation ("ADEC") from

HOLLAND & HART LLP
ATTORNEYS AT LAW

Mr. Chuck Clarke

02/16/00

Page 2

permitting the seventh diesel electric generator, MG-17, that was added by the PRI PSD permit issued by ADEC on December 10, 1999, and prohibits Cominco from undertaking any and all activities associated with construction of that generator.

The PRI is vital to the future of the Red Dog Mine. Without the power provided by MG-17, the PRI cannot be fully implemented. If Cominco is unable to pour the concrete for the foundation for this engine during the short "window" in July and August when that is feasible, and to install, test and operate that engine, its production and revenue will be severely affected. It will not be possible to again begin construction on the foundation until July and August of the following year. The cost of the lost production, which will certainly be millions of dollars, is of course, irreparable, because EPA, which is responsible for the decision causing this harm, is protected by sovereign immunity. In order to prevent this unnecessary harm, which will be inflicted without producing any significant environmental benefit, Cominco requests that EPA stay the Orders issued until the United States Court of Appeals for the Ninth Circuit has decided the appeals filed in that court by ADEC and by Cominco.

Cominco has agreed not to take any actions that would prevent the later installation of SCR on MG-17 in case EPA prevails in its collateral attack on ADEC's determination that "Low NO_x" technology rather than SCR is BACT for that engine. It has done so at very considerable additional expense in costs for construction of the module. As a result, EPA's issuance of a stay pending decision by the court will not prejudice the potential for installation of SCR.

On behalf of Cominco, we have filed Petitions for Reviews of the Orders in the United States Ninth Circuit Court of Appeals on February 8, 2000 (Finding of Noncompliance and Order dated December 10, 1999) and on February 14, 2000, (Administrative Order dated February 8, 2000). We currently intend to file with the Ninth Circuit motions for stay, requesting the court to stay the effectiveness of the Orders pending its decision on EPA's authority to override ADEC's decision by enforcement order and prohibit Cominco from acting to construct and operate MG-17 under the authority of the permit issued to it. In an effort to avoid the need to file a motion for stay, we hereby request, on behalf of Cominco, that you stay the effect of the EPA's Orders pending the court's decision on the Petitions for Review filed by ADEC and Cominco.

HOLLAND & HART LLP
ATTORNEYS AT LAW

Mr. Chuck Clarke
02/16/00
Page 3

We believe the Orders are not valid and are unlikely to be upheld on appeal. Because EPA has approved Alaska's PSD State Implementation Plan and permit program, ADEC is the permitting authority responsible for making case-by-case BACT determinations under Sections 110(a)(2)(C), 165(a)(4) and 169(3) of the Clean Air Act (the "Act"). ADEC has discharged its responsibility to make a BACT decision in this case, based on the weighing of state and local environmental factors, energy and economic cost-effectiveness considerations in determining the maximum achievable reduction. ADEC's good-faith and reasonable exercise of its discretion as permitting authority is not a violation of the Act, and there is thus no basis for EPA's Orders treating it as a violation that invalidates Cominco's permit for MG-17. The Act does not authorize EPA to substitute its judgment respecting ADEC's BACT determination or to preempt or veto that determination.

Moreover, where EPA has approved a state's PSD program and the state issues a PSD permit, EPA may not collaterally attack the permit and thereby put a permittee at risk of enforcement when it acts in accordance with the state-issued permit. *U.S. v. Solar Turbines*, 732 F. Supp. 535 (M.D. Pa. 1989). In *Solar Turbines*, the court held that it was not a violation for a permittee to act in accordance with a permit issued by the state, even if EPA disagreed with the state's determination. It also held that the Act authorized enforcement only for violating objective standards, such as failures to apply for a permit or failures to comply with quantifiable emission limits, not to challenge discretionary judgments, such as BACT determinations. The Act does not contemplate that a regulated source should be caught in the middle of a conflict between agencies.

Where EPA has authorized a state to make regulatory decisions under the Act, EPA has no right to pursue enforcement merely because it disagrees with the state's decision. Its only recourse in such a case is to pursue a prospective revision to the state program or to appeal the state's decision through administrative and state judicial channels. *U.S. v. Ford Motor Co.*, 736 F. Supp. 1539, 1548 (W.D. Mo. 1990). EPA may not unilaterally override the exercise of the state's discretion. *Id.*

The Supreme Court has held that the primary responsibility for making decisions such as BACT rests with the State and that EPA "is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Train v. NRDC*, 421 U.S. 60, 79 (1975). Justice Rehnquist, for the Court, wrote that:

HOLLAND & HART LLP
ATTORNEYS AT LAW

Mr. Chuck Clarke
02/16/00
Page 4

The Act gives the Agency no authority to question
the wisdom of a State's choice of emission
limitations if they are part of a plan [SIP] which
satisfies the standards of § 110(a)(2) . . .

Id. In this case, EPA has approved Alaska's PSD SIP, including the provisions designating ADEC as the permitting authority to make BACT decisions, under Section 110(a)(2)(C). 40 C.F.R. § 52.96 (1999). There is no question that the nationally applicable standards—the ambient NAAQS for NO₂ and PSD increments—will be met.

Unless stayed, the Order will result in irreparable harm to Cominco. That harm arises in part from putting Cominco and its responsible officials at risk of severe criminal and civil penalties without having accorded them any due process, and in part from the economic loss to Cominco that would arise from compliance with EPA's Order. As noted above, because Cominco may not recover that economic loss from EPA due to the agency's sovereign immunity, that loss would be irreparable.

We know that the PRI, including MG-17 with Low NO_x controls, complies with the NAAQS and PSD increment for NO₂. Therefore, allowing MG-17 to be installed and operated with Low NO_x controls pending the Ninth Circuit's ruling would not result in any adverse impact on human health or welfare or on the environment. We therefore request that you grant a stay of your Orders pending final decision by the Ninth Circuit Court of Appeals.

Your Order also requires that Cominco contact you within 10 days in order to confer with EPA. This letter requests such a conference on behalf of Cominco. Please contact Charlotte MacCay at 907-272-2172 to arrange a time and place convenient to EPA and Cominco representatives.

Because the orders and schedules for MG-17 are currently in progress, the need for a timely decision on Cominco's request to stay the Orders is critical. It will be necessary for Cominco to file a motion for stay of the Orders with the Court of Appeals for the Ninth Circuit if we are unable to achieve the grant of a

HOLLAND & HART LLP
ATTORNEYS AT LAW

Mr. Chuck Clarke
02/16/00
Page 5

stay by EPA prior to February 25, 2000. Thank you for your courtesy and understanding in this matter.

Very truly yours,

A handwritten signature in cursive script, reading "Robert T. Connery".

Robert T. Connery
of Holland & Hart LLP

cc: Julie Matthews, Esq.
John Key
Doug Horswill
Charlotte MacCay
Jim Kulas
Bruce DiLuzio, Esq.
Larry Hartig, Esq.
Cameron M. Leonard, Esq.

2626858_1.DOC

COM 64-005